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Terrorism's Proscription and Core Elements of an Objective Definition

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Terrorism's Proscription and Core Elements of an Objective Definition

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This essay is a response to the interesting article by Naomi Norberg on *Terrorism and International Criminal Justice* that appears in this symposium.[1] What I find most interesting is her attention to the problem posed by a tendency of many to consider "the other" as being unworthy of human dignity and the abnegative consequences for humanity that often occur from such a misperception. It is a misperception that has been manipulated and too often has contributed to the criminal treatment and targetings of other human beings that we recognize as war crimes, genocide, and other crimes against humanity. Tolerance and respect for the dignity of others will serve to better effectuate human rights and more adequately prevent various types of international crime.[2] One such crime is terrorism.[3]

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1. Naomi Norberg, *Terrorism and International Criminal Justice: Dim Prospects for a Future Together*, 8 SANTA CLARA J. INT'L L. 11 (2010).
2. *See also* Jordan J. Paust, *Tolerance in the Age of Increased Interdependence*, 56 FLA. L. REV. 987, 987-92, 1001-02 (2004).
3. With respect to interconnections between terrorism and human rights, see, *e.g.*, Jordan J. Paust, *The Link Between Human Rights and Terrorism and Its Implications for the Law of State Responsibility*, 11 HASTINGS INT'L & COMP. L. REV. 41 (1987). *See also* Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 53 (1978) (regarding "terrorist activities . . . [of] individuals or of groups . . . [they are] activities that are in clear disregard of human rights").

With respect to terrorism, I agree that "terrorism is a serious crime"[4] and that there is a general need for an all encompassing reach of international criminal proscriptions to include perpetrators of any status (for example, elite officials as well as private perpetrators) and any socio-political context (for example, from peace to war), unless an international crime is necessarily limited by the international community to a particular context (for example, the limitation of application of the laws of war to circumstances of armed conflict). The proscription of terrorism should reach all perpetrators and govern in any context outside of an exception that the international community appears to accept through general patterns of expectation and practice concerning the specific exception (*e.g.*, an exception within the context of an international armed conflict when privileged combatants engage in the terroristic targeting of enemy combatants who are still taking an active part in armed hostilities).[5]

4. It is not expected that every use of terrorism will affect the international community in some direct manner. Therefore, affectation of the community should not be part of a definitional criterion. *Cf.* Norberg, *supra* note 1, at 13.

5. *See* Jordan J. Paust, *An Introduction to and Commentary on Terrorism and the Law*, 19 CONN. L. REV. 697, 707-08 (1987) [hereinafter Paust, *An Introduction*]; Jordan J. Paust, *Terrorism and the International Law of War*, 64 MIL. L. REV. 1 (1974); *see also infra* notes 13-16. This exception can have important implications with respect to prosecution of alleged al Qaeda perpetrators of "terrorism" in violation of the laws of war or complicity with respect to such law of war violations. For example, if a member of al Qaeda kills a U.S. soldier while they are exchanging gunfire in Afghanistan, one question might be whether the member of al Qaeda has committed an offense against the laws of war when the person targeted was not a civilian or a civilian taking a direct part in hostilities. *See infra* notes 13-16. More generally, merely fighting as an unprivileged fighter during an armed conflict is not a violation of the laws of war, although the unprivileged fighter will not be entitled to "combatant" status and "combatant immunity" for what might otherwise be lawful targetings of military personnel and other military targets during an international armed conflict and, therefore, will be subject to prosecution under relevant domestic law. *See, e.g.*, Jordan J. Paust, *Responding Lawfully to al Qaeda*, 56 CATH. U. L. REV. 759, 767-71 (2007). In the hypothetical, the member of al Qaeda would most likely be an unprivileged fighter (unless he was also a member of the regular armed forces of a party to an international armed conflict in Afghanistan and, therefore, a "combatant"), and would not be a war criminal (unless he kills the U.S. soldier after capturing him, which is a war crime even though it is committed by a civilian unprivileged fighter), but he could be prosecuted in a U.S. federal district court under the extraterritorial Antiterrorism Act, 18 U.S.C. § 2332(a) ("Whoever kills a national of the United States, while such national is outside the United States . . ."). There is no requirement under § 2332 that "terrorism" occur, much less that the overly broad definition of terrorism set forth in § 2331 occur

In a series of resolutions since 1985, the United Nations General Assembly and Security Council have often condemned, as criminal, all acts of terrorism, committed wherever and by whomever.[6] More recently, the Security Council reaffirmed in 2008 "that terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed."[7] Therefore, since 1985 there has been evidence of a consistent pattern of *opinio juris* (which is an element of customary international law[8]) shared by representatives of states within the General Assembly and by the Security Council that the criminal proscription of terrorism has a universal reach and applies to all persons of any status (for example, a reach also to governmental actors) and regardless of any putative justifying motivation. Importantly, an objective definition of terrorism would mirror such a longstanding pattern of legal

(which applies with respect to civil claims brought under § 2333). *Id.* Nor is there a requirement that the killing be a war crime. *Id.* As this essay generally demonstrates with respect to an objective definition of terrorism, whether the member of al Qaeda is a "terrorist" should depend on whether he used the tactic of "terrorism." I do not doubt that al Qaeda as an organization has often used "terrorism," properly defined. It would follow that the member of al Qaeda is a member of a "terrorist" organization, but not that he is a "terrorist." Whether or not he was a complicitor in terrorism would not hinge on mere membership, but would involve inquiry into whether he was aware that his conduct facilitated the commission of an act of terrorism by another person or group of persons.

6. *See, e.g.*, Note by the President of the Security Council, U.N. SCOR, 2618th mtg., U.N. Doc. S/17554 (Oct. 9, 1985) (the President, acting "on behalf of the members of the Council" and endorsing the Secretary-General's statement of Oct. 8, 1985, "resolutely" condemned "'all acts of terrorism' . . . in all its forms, wherever and by whomever committed"); G.A. Res. 40/61, at 302, Supp. No. 53, U.N. Doc. A/RES/40/61 (Dec. 9, 1985) (the General Assembly "[u]nequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed") (emphasis omitted); INTERNATIONAL CRIMINAL LAW 827, 829, 841, 844-46 (Jordan J. Paust et al. eds., 3d ed. 2007) [hereinafter ICL]. For a survey of other resolutions and relevant developments, see also Beth Van Schaack, *Finding the Tort of Terrorism in International Law*, 28 REV. LITIG. 382, 408-428 (2009); Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, G.A. Res. 63/185, pmbl., U.N. Doc. A/RES/63/185 (Dec. 18, 2008); Measures to Eliminate International Terrorism, G.A. Res. 63/129, pmbl. and ¶¶. 1, 4, U.N. Doc. A/RES/63/129 (Dec. 11, 2008). Admittedly, there is a tension between broad language condemning all acts of terrorism and specific patterns of expectation and practice tolerating use of terror tactics by combatants against combatants who are still taking an active part in an international armed conflict. It seems preferable to resolve the tension by recognizing the existence of a specific exception to the impermissibility of acts of terrorism. *See supra* note 5.

7. S.C. Res. 1822, pmbl., U.N. Doc. S/RES/1822 (June 30, 2008).

8. *See, e.g.*, ICL, *supra* note 6, at 6-9.

expectation and not exclude contexts in which the tactic of terrorism might be used, types of perpetrators, or any particular use of the tactic because of a perpetrator's putative justification. The task of identifying an objective definition and its core elements is different than the task of deciding whether a particular use is permissible under international law.

As Professor Norberg rightly notes, one problem that has interfered with more adequate international cooperation, prevention, and responses to terrorism is that although the international community has consistently affirmed for nearly a quarter century that terrorism is an international crime, the community has been unable to articulate a widely accepted definition of "terrorism." Given the "insufficient consensus as to a precise definition or possible exceptions," Professor Norberg concludes that there are "reasons for not elevating terrorism to the rank of 'international crime,'" at least before the International Criminal Court (ICC).[9] She rightly warns, moreover, of the tendency of too many states to criminalize, in the name of anti-terrorism, conduct that has nothing to do with an intent of a perpetrator to produce a state of terror, much less an actual outcome of terror. When compared with an objective definition of terrorism that is found easily in many dictionaries,[10] some national legislative definitions are, in fact, laughably ludicrous if not dangerous and offensively overly broad.[11] However, the core of an objective definition of terrorism can be identified and it would be improper to conclude that terrorism, properly defined, is not in nearly all instances an international crime.

Certain forms of terrorism have been expressly proscribed under the laws of war. For example, among the customary crimes identified in the 1919 List of War Crimes prepared by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties that was presented to the Preliminary Peace

9. Norberg, *supra* note 1, at 13.
10. *See* ICL, *supra* note 6, at 842.
11. *See id.* at 834-36, 841-42; Paust, *An Introduction*, *supra* note 5, at 697, 703-05, 748. *See also* Norberg, *supra* note 1, at 28, 32-34, 44. Professor Norberg rightly complains of the "loose use of the word terrorism." *Id.* at 13.

Conference in Paris after World War I, is the crime of "systematic terrorism."[12] Article 33 of the 1949 Geneva Civilian Convention also expressly proscribes "terrorism" with respect to civilians protected under the Convention.[13] More recently, Article 51, paragraph 2, of Protocol I to the Geneva Conventions expressly declares that "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[14] In fact, the proscription in Protocol I reflects at least one element of an objective definition of terrorism, a "purpose . . . to spread terror." Article 4, paragraph 2, of Protocol II to the Geneva Conventions also criminalizes "acts of terrorism" against persons "who do not take a direct part in or who have ceased to take part in hostilities" in non-international armed conflicts[15] and Article 13, paragraph 2, prohibits "[a]cts or

12. Comm'n on the Responsibility of the Authors of the War & on Enforcement of Penalties, List of War Crimes, crime no. 1 (Mar. 29, 1919), reprinted in ICL, *supra* note 6, at 36 [hereinafter 1919 List].
13. Geneva Convention Relative to the Prot. of Civilian Persons in Time of War, art. 33, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC]. *See also* 4 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 226 (International Committee of the Red Cross [ICRC], Jean S. Pictet ed. 1958) ("[T]he prohibition of all measures of intimidation [and] terrorism with regard to protected persons [applies] wherever they may be."). A violation of the Geneva Conventions is a war crime. *Id.* at 583, 594, 602; *see also infra* note 53. The "protected persons" to which Article 33 refers are set forth in Article 4 of the Convention. One general limitation is that such persons must be "in the hands of a [p]arty to the conflict or [o]ccupying [p]ower of which they are not nationals." *See* GC, *supra,* art. 4; *but see id.* arts. 13-26 (regarding special coverage for nationals). If persons are "[n]ationals of a neutral State" "in the hands of" a state party to the armed conflict and are outside "the territory" of the latter state, they are also protected. *See id.* art. 4.
14. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I] (stating that the prohibition is limited to the targeting of civilians). *See also* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 29-34 (Cambridge University Press 2005) (stating that the prohibition is part of customary international law). Prosecutor v. Galić, Case No. IT-98-29-T, Trial Chamber Judgment and Sentence, ¶¶ 133-134 (Dec. 5, 2003) (declaring that three elements need to be proven with respect to this crime: (1) acts of violence directed against the civilian population or individual civilians not taking a direct part in hostilities causing death or serious injury to body or health within the civilian population, (2) the offender wilfully made the civilian population or individual civilians not taking a direct part in hostilities the object of those acts of violence, and (3) the offence was committed with the primary purpose of spreading terror among the civilian population).
15. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4(2)(d), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Protocol II]. The prohibition is limited to

threats of violence the primary purposes of which is to spread terror among the civilian population."[16] Professor Norberg adds that there has been a related recognition by the ICTY that the customary prohibition of "'terrorizing the civilian population'" is a war crime.[17]

The fact that these international criminal law instruments do not provide a definition of the crime of terrorism or all of its elements does not mean that the crime does not exist as a matter of international law, although it does underscore the need for an objective definition. Rape is also expressly listed in the 1919 List of War Crimes,[18] the Geneva Civilian Convention,[19] Geneva Protocol I,[20] and Geneva Protocol II[21] and, although it is not defined and its elements are not listed, rape is also a recognized war crime.[22] This is not an unusual phenomenon in international criminal law. When the accused at Nuremberg complained that treaties regarding peace and the 1907 Hague Convention No. IV[23] did not contain the words "crime" or "criminal," did not set forth elements of offenses, and did not set forth penalties, the International Military Tribunal recognized that the treaties nonetheless reflected customary international law. The International Military

the targeting of those who are not taking "a direct part . . . in hostilities." *Id.* Thus, it does not apply to the targeting of civilians who are taking a direct part in hostilities. Once a person is captured they are not considered to be taking a direct part in hostilities. The Statute of the International Criminal Tribunal for Rwanda contains a similar prohibition of "[a]cts of terrorism." *See* S.C. Res. 955, Annex, art. 4(d), U.N. Doc. S/RES/955 (Nov. 8, 1994).

16. Geneva Protocol II, *supra* note 15, art. 13(2). The prohibition is limited to the targeting of civilians. *See also* HENCKAERTS & DOSWALD-BECK, *supra* note 14, at 32-40 (stating that the prohibition is part of customary international law).
17. *See* Norberg, *supra* note 1, at 18. There can be a distinction between "terrorizing the civilian population" as such and terrorizing civilians who are taking a direct part in hostilities. *See also supra* note 15 and accompanying text.
18. *See* 1919 List, *supra* note 12, crime no. 5.
19. *See* GC, *supra* note 13, art. 27.
20. *See* Geneva Protocol I, *supra* note 14, art. 76(1).
21. *See* Geneva Protocol II, *supra* note 15, art. 4(2)(e).
22. *See, e.g.*, ICL, *supra* note 6, at 691, 693. Rape is also listed in the Rome Statute of the ICC with respect to crimes against humanity although it is not defined in the Statute. *See* Rome Statute of the International Criminal Court, art. 7(1)(g), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute of the ICC].
23. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

Tribunal also recognized that a violation of the treaties regarding peace is a crime against peace and that a violation of the Hague Convention and the customary laws of war reflected therein is a war crime subject to criminal sanctions.[24]

More generally, there are standards for identification and clarification of normative content that are well-known whether one is interpreting treaty-based or customary international law. With respect to treaties, one tries to identify the "objective" meaning of a term or phrase, as supplemented by certain other indicia of meaning.[25] An objective meaning is one that is generally shared in the international community, a meaning or content that can be evidenced in several ways.[26] Similarly, with respect to customary international law, normative content is based in generally shared *opinio juris* or juristic meaning.[27] One seeks to identify a core of generally shared meaning. It is within the core that a present meaning exists, despite the fact that outside the generally shared core there are other logically possible meanings or meanings shared by only a minority within the international community.[28] The meaning of a term set forth in several dictionaries in various languages is normally useful evidence of an objective or generally shared meaning,[29] and courts have used numerous other evidences of patterns of

24. *See* ICL, *supra* note 6, at 12 (describing a study by Professor Bassiouni of international criminal law instruments showing that most international criminal law instruments only contain "[i]mplicit recognition of the penal nature of the act"), 461 (noting how the International Military Tribunal regards treaties and offenses against peace), 469 (observing that the Einsatzgruppen Case noted that the Hague Convention creates war crime responsibility even though there is no mention of courts), 594 (noting that the International Military Tribunal indicated that the Hague Convention does not mention crimes or courts, but "[m]any of these prohibitions had been enforced before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offenses against the law of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders").
25. *See, e.g.*, Vienna Convention on the Law of Treaties, art. 31, May 31, 1969, 1155 U.N.T.S. 331.
26. *See, e.g., id.*; JORDAN J. PAUST, JON VAN DYKE & LINDA A. MALONE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 68-69 (2d ed. 2005).
27. *See, e.g.*, PAUST, VAN DYKE & MALONE, *supra* note 26, at 4-5, 12, 29-30, 42-43, 46-48, 69, 93-94, 100-08, 355-58, 365; *see also* ICL, *supra* note 6, at 7-9; *see also* Jordan J. Paust, *The History, Nature, and Reach of the Alien Tort Claims Act*, 16 FLA. J. INT'L L. 249, 258-61 & nn.25 & 28 (2004); *see also* Jordan J. Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 GA. J. INT'L & COMP. L. 147, 148, 150-51, 155-57 (1995/96) [hereinafter Paust, *Complex Nature*]. Since the patterns need only reflect generally shared expectation, there is no need for unanimity of *opinio juris*. *Id.* at 151.
28. *See* PAUST, VAN DYKE & MALONE, *supra* note 26.
29. *See, e.g., id.* at 76-77, 79.

generally shared expectation in an effort to identify and clarify normative content.[30]

With respect to the tactic of terrorism in particular, one can identify certain objective and shared elements of terrorism despite the fact that some domestic definitions are either incomplete or overly broad. First, given the consistent and widespread condemnation of terrorism by the General Assembly and Security Council in all its forms, wherever and by whomever committed, it is evident that there can be no exclusion of perpetrators from an objective definition on the basis of the status of the perpetrator. Any definition that attempts to limit terrorism to private actors, governmental actors, insurgents, or those who otherwise oppose the state would be incomplete and not objective.

Second, since dictionaries often note that terrorism involves an outcome of terror or intense fear or anxiety,[31] a definition of terrorism that does not include a terror outcome as an element would not be realistic and objective. Objectively, terrorism must necessarily involve the creation of terror. For this reason, attempts to criminalize as "terrorism" mere "intimidation" of some primary human target or efforts to "coerce," "influence," "disturb," "endanger," or "threaten" such a target would clearly be overly broad.[32] Adding the word "seriously"[33] or the phrase "by criminal conduct"[34] simply does not equate with the realistic and objective element of terror outcome.

30. *See, e.g., id.* at 4-5, 30, 45-50, 56, 106-07; Paust, *Complex Nature, supra* note 27, at 161-62.
31. *See, e.g.*, ICL, *supra* note 6, at 842. Attempted terrorism would involve an intent to produce terror, but not the outcome of terror. *See id.*; *see also* Paust, *An Introduction, supra* note 5.
32. *See* ICL, *supra* note 6, at 829, 834-36, 842. Some forms of coercion, intimidation, or influence over governmental elites are actually preferred in a democracy committed to free speech and assembly and have nothing to do with an intent to produce terror.
33. *See id.* at 835-36.
34. *See id.* at 829, 834-35, 842, 846. The word "criminal" begs the very question at stake. Further, "criminal" under what law, domestic or international? If domestic law is the standard, whose domestic law? And what if what the world knows as terrorism is not proscribed under a given state's domestic law or the underlying elements are not proscribed? Adding the limiting word "criminal" with respect to a definition of an international crime is worse than useless, it is potentially dangerous.

Third, given an apparently generally shared expectation that terrorism is an intentional crime,[35] an objective element should require that the perpetrator of terrorism have an intent to produce a terror outcome. This element has been expressed before in a 1937 Convention,[36] Geneva Protocol I,[37] Geneva Protocol II,[38] and in a 1994 General Assembly resolution.[39] Some definitions contain a political purpose element,[40] which could be expanded to include an ideological, religious, ethnic, or race-based purpose.[41] In any event, it is evident that a realistic and objective definitional core regarding terrorism can be identified, and that realistic and objective definitional elements must include an intent to produce terror and a terror outcome. No exclusion of context or types of actors should be part of an objective definition, although one form of terroristic targeting appears to be lawful (*i.e.*, combatant to combatant targeting during an international armed conflict)[42].

35. For evidence of use of an intent element, see, *e.g.*, *id.* at 828-29, 835, 841-42, 844, 846; ANTONIO CASSESE, INTERNATIONAL LAW 449 n.25, 450 (2d ed. 2005) (explaining that the acts "must be aimed at spreading terror" and "[a]s for *mens rea*, there must be a criminal intent to perpetrate the acts . . . as well as the special intent (*dolus specialis*) to spread terror"); Van Schaack, *supra* note 6, at 412, 415, 419, 427. The so-called anti-terrorism treaties addressing aircraft hijacking, aircraft sabotage, attacks on internationally protected persons, hostage-taking, and so forth also address intentional conduct as opposed to wanton and reckless *mens rea* or criminal negligence. Further, the Terrorist Bombings Convention also requires an intent to engage in relevant conduct. *See* International Convention for the Suppression of Terrorist Bombings, adopted by G.A. Res. 52/164, art. 2(1)(a)-(b), U.N. Doc. A/RES/52/164 (Jan. 9, 1998) [hereinafter Terrorist Bombings Convention].
36. *See* ICL, *supra* note 6, at 834 (explaining terrorism as criminal acts "intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public").
37. *See supra* text accompanying note 14.
38. *See supra* text accompanying note 15.
39. Declaration on Measures to Eliminate International Terrorism, G.A. Res. 49/60, Annex, ¶ 3, U.N. Doc. A/RES/49/60/Annex (Dec. 9, 1994) (explaining that criminal acts "intended or calculated to provoke a state of terror in the general public, a group of persons or a particular person" are unjustifiable). The same language appears in a 2008 resolution. *See* G.A. Res. 63/129, *supra* note 6, ¶ 4. The 1994 and 2008 resolutions do not exclude victims of terror on the basis of any particular status. Professor Cassese remarks that the 1994 resolution "sets out an acceptable definition of terrorism." CASSESE, *supra* note 35, at 449 n.25. However, the resolution did not specifically mention a terror outcome.
40. *See, e.g.*, ICL, *supra* note 6, at 834-35, 841-42, 844, 846.
41. *See id.* at 835; Van Schaack, *supra* note 6, at 411, 435, 447 n.295.
42. *See supra* note 4. *See also* Geneva Protocol II, *supra* note 15, art. 4(2) (implicitly not proscribing the targeting of those taking a direct part in hostilities during an armed conflict not of an international character).

Importantly, use of an objective definition of terrorism as a tactic will allow the international community to focus on the proscribed tactic as opposed to questioning whether a particular armed struggle is permissible. Confusion of the tactic of terrorism (a tactic that can be used in any social context) with an overall struggle is unnecessary and has been recognized as a stumbling block.[43] During any permissible use of armed force, there are some tactics and forms of treatment that are criminally proscribed. The same point pertains with respect to antiterrorism efforts of a state. Moreover, the fact that former President Bush and Vice President Cheney and several other members of the Bush Administration authorized, ordered, and/or abetted international crimes such as forced disappearance and torture as responses to terrorism[44] does not deflate the impermissibility of tactics of terrorism. Each form of criminal conduct is and remains an international crime.

I agree with Professor Norberg that "international crimes originate in and are defined by international law,"[45] if she agrees that international crimes are created directly by international law and are international crimes because they are

43. *See, e.g.*, ICL, *supra* note 6, at 829, 836, 840-41; Karima Bennoune, *Terror/Torture*, 26 BERKELEY J. INT'L L. 1, 19-25 (2008) (stressing that nonetheless "enough of an international consensus exists on the core of a definition of terrorism for enforcement efforts to proceed"); Paust, *An Introduction*, *supra* note 5, at 705-07, 710-13, 735-36; Van Schaack, *supra* note 6, at 415.

44. *See, e.g.*, JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR (2007); Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535 (2009) [hereinafter Paust, *Torture*], draft *available at* http://papers.ssrn.com/so13/papers.cfm?abstract_id=1331159; Jordan J. Paust, *The Second Bybee Memo: A Smoking Gun*, JURIST (Apr. 23, 2009), *available at* http://jurist.law.pitt.edu/forumy/2009/04/second-bybee-memo-smoking-gun.php. Unfortunately, these types of manifestly illegal responses to terrorism were of predictable concern more than a decade and a half before the Bush Administration's common plan to authorize and abet international crimes. *See, e.g.*, Paust, *An Introduction*, *supra* note 5, at 723-26, 748 (warning of antiterrorism manipulations that threaten judicial power and constitutionally-based human rights while seeking to radically extend executive power and engage in "lawless law enforcement, torture, abductions, disappearances, and assassination of political enemies"). Nonetheless, predictability of criminal behavior does not make it permissible.

45. *See* Norberg, *supra* note 1, at 16.

criminally sanctionable under international law, either treaty-based or customary.[46] Beyond this criterion of creation and content, it is dangerous to generalize and to use unrealistic models or categorizations. For example, torture addressed in the Convention Against Torture[47] happens to be a treaty-based and customary international crime whether or not a particular use of torture occurs at one moment, occurs within a single state, the direct victim has the same nationality as the perpetrator, and the act of torture produces any transnational effects. The same point can be made with respect to a single act of genocide, forced disappearance of a person, slavery, apartheid, or a war crime such as rape that occurs during a local insurgency. None of these international crimes have to be transnational or more serious than a domestic crime (such as a local bank robbery resulting in the death of sixty persons, fifteen of whom are children). None have to be more egregious, shocking, massive, widespread, threatening to or touching the international community, or of greater gravity.[48] One act of piracy in South Asia that is little known is still an international crime over which there is universal jurisdiction and a responsibility to initiate prosecution or extradite whether or not it is more serious than a local bank robbery.

The fact that the ICC can only address a single act of genocide or a single war crime committed during a local insurgency if it is considered to be of "sufficient gravity,"[49] whatever that means, does not mean that the international crime has to be "on a massive scale"[50] or that the lack of ICC jurisdiction will obviate the

46. *See* ICL, *supra* note 6, at 5, 19.
47. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].
48. *See* ICL, *supra* note 6, at 19-20. Thus, the quest by some for some magical or essential difference between an international crime and a domestic crime beyond the fact that an international crime is created by international law will not be fruitful. What makes an international crime an international crime is the fact that the international community has made it so by treaty (operative among the parties and their nationals) or customary international law.
49. *See* Rome Statute of the ICC, *supra* note 22, art. 17(1)(d). The ICC does not use the phrase "extreme gravity."
50. *But see* Norberg, *supra* note 1, at 13 (seemingly assuming, for example, that if a war crime or act of genocide within the jurisdiction of an international tribunal occurs, underlying human rights are "violated on a massive scale"). It may be that crimes prosecuted before the ICTY and ICTR were committed "in the context of a conflict reaching critical mass," *see id.* at 20, but such a context and "state-like attributes" are not required, for example, with respect to the commission of a single act of genocide or a war crime engaged in within a theater of war by a civilian. The customary definition of genocide reflected in Article II of

criminal nature of the conduct. The Statute of the ICC notes that although there is a requirement that ICC jurisdiction is limited to crimes defined in the Statute, this jurisdictional limitation regarding the ICC "shall not affect the characterization of any conduct as criminal under international law independently of this Statute."[51] Importantly, with respect to the customary duty to prosecute international crimes, the Statute also expressly affirms the recognition of 160 states that created the Rome Statute that there is a "duty of every State to exercise its criminal jurisdiction over those responsible for [all] international crimes."[52] This duty arises expressly under the vast majority of international criminal law treaties adopted since the mid-1970s with respect to crimes addressed in each treaty as an absolute obligation to either initiate prosecution of or to extradite any person of any status who is reasonably accused[53] and is expressed in customary international law with

the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, is the same definition that is contained in Article 6 of the Rome Statute of the ICC, *supra* note 22. Neither definition requires that genocide be committed by a state actor, in the context of some "critical mass," or with "state-like attributes." *See also* The Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. IV [hereinafter Genocide Convention] (genocide can be committed by "private individuals"); Kadic v. Karadzic, 70 F.3d 232, 241-42 (2d Cir. 1995) (the articles "unambiguously reflect that . . . the proscription of genocide has applied equally to state and non-state actors [and] . . . to private individuals").

51. *See* Rome Statute of the ICC, *supra* note 22, art. 22(3).

52. *See id.* pmbl. See also *infra* note 4 regarding the affirmation of this duty by 160 states that met in Rome to create the ICC and, therefore, relevant *opinio juris* of the majority of the international community concerning the reach of this duty to all states and with respect to all international crimes, not merely those within the jurisdiction of the ICC.

53. *See, e.g.*, CAT, *supra* note 47, art. 7(1); GC, *supra* note 13, art. 146; Geneva Protocol I, *supra* note 14, arts. 85(1), 88(2); Terrorist Bombings Convention, *supra* note 35, art. 8(1); International Convention for the Protection of All Persons From Enforced Disappearance, 11(1) [hereinafter Enforced Disappearance Convention], adopted by G.A. Res. 61/177 (Dec. 20, 2006); ICL, *supra* note 6, at 847. With respect to the Geneva Conventions, the authoritative Commentary of the International Committee of the Red Cross notes "repression of grave breaches . . . [is] to be universal . . . [with those reasonably accused] sought for in all countries," adding: "the obligation to prosecute and punish . . . [is] absolute." 4 COMMENTARY, *supra* note 13, at 587, 590, 597, 602. With respect to common Article 1 of the Geneva Conventions, the ICRC adds that signatories "should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally." *Id.* at 16. The ICRC also notes that other breaches of the Conventions are war crimes. *See id.* at 583 ("The Geneva Conventions form part of what are generally called the laws and customs of war, violations of which are . . . 'war crimes.'"), 594 (parties

respect to any violation of customary international criminal law as a universal duty *aut dedere aut judicare*.[54]

"must also suppress all other acts contrary to the provisions of this Convention . . . repression of breaches other than the grave breaches listed . . . all breaches of the Convention should be repressed . . . should institute judicial or disciplinary punishment for breaches of the Convention."), 602 ("other breaches . . . will be punished"); 3 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 367-68 (ICRC, Jean S. Pictet ed., 1960) ("the 1929 Convention called for the punishment of *all* acts contrary to the provisions of the Convention . . . *all* breaches of the present Convention should be repressed . . . [and national legislation] must include a general clause . . . providing for the punishment of other breaches of the Convention."). It is widely known more generally that any violation of the laws of war is a war crime. *See, e.g.*, ICL, *supra* note 6, at 158, 162, 639, 643 n.6, 663, 670, 672-73; PAUST, *supra* note 44, at 133 n.2; U.S. DEP'T ARMY, FM 27-10, THE LAW OF LAND WARFARE 117, para. 499 ("The term 'war crime' is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime"), 119, para. 506(b) (the requirements set forth in GC art. 146 "are declaratory of the obligation of belligerents under customary international law to take measures for the punishment of war crimes committed by all persons, including members of a belligerent's own armed forces.") (1956); Kadic v. Karadzic, 70 F.3d 232, 236, 240, 242-43 (2d Cir. 1995).

54. *See, e.g.*, ICL, *supra* note 6, at 10, 12, 131-44, 155, 169; M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE 22-26, 51-53 (1995); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 5-11 (3d ed. 1997); HENCKAERTS & DOSWALD-BECK, *supra* note 14, at 606-11; Christine Van den Wyngaert, *War Crimes, Crimes Against Humanity, and Statutory Limitations*, 3 INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 8 (M. Cherif Bassiouni ed. 1987); Rudiger Wolfrum & Dieter Fleck, *Enforcement of International Humanitarian Law*, *in* DIETER FLECK (ED.), THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 683-84 (2d ed. 2008); Paust, *Torture*, *supra* note 44, at 1537-38, 1540-42; INT'L LAW ASS'N, RES. NO. 7, REPORT OF THE SIXTY-FIRST CONFERENCE 7 (1985) ("States must try or extradite (*aut judicare aut dedere*) persons accused of acts of international terrorism. No state may refuse to try or extradite a person accused of an act of terrorism, war crime . . . or a crime against humanity . . . ."). When 160 states met in Rome in 1998 to create the ICC, they affirmed the universal duty "to put an end to impunity for the perpetrators" of war crimes, genocide, and other crimes against humanity; stressed that "effective prosecution must be ensured by taking measures at the national level"; and recalled "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." Rome Statute of the ICC, *supra* note 22, pmbl.

All states have a competence to prosecute crimes under customary international law that is known as universal jurisdiction and they retain that competence whether or not they take full advantage of it at particular times or even adopt self-limiting measures under domestic law or some regional treaty. *See, e.g.*, ICL, *supra* note 6, at 155-74; HENCKAERTS & DOSWALD-BECK, *supra* note 14, at 604-07 (universal jurisdiction exists regarding war crimes); RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 & cmt. a, RN 1 (3d ed. 1987); 4 COMMENTARY, *supra* note 13, at 587, 602; FM 27-10, *supra* note 53, at 119, para. 507 ("Universality of Jurisdiction"). Such a competence (as well as the duty to prosecute) was recognized early in U.S. history. *See, e.g.*, United States v.

Furlong, 18 U.S. (5 Wheat.) 184, 197 (1820) ("Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all . . . within this universal jurisdiction."); United States v. Smith, 18 U.S. (5 Wheat.) 153, 161, 163 (1820) (piracy is "an offence against the universal law of society"); United States v. Klintock, 18 U.S. (5 Wheat.) 144, 147-48 (1820) (piracy "is an offense against all. It is punishable in the Courts of all . . . [our courts] are authorized and bound to punish."); Talbot v. Janson, 3 U.S. (3 Dall.) 133, 159-60 (1795) (Iredell, J.) ("all . . . trespasses against the general law of nations, are enquirable and may be proceeded against in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it."), quoted in The Divina Pastora, 17 U.S. (4 Wheat.) 52, 65 (1819) (Marshall, C.J.); Ross v. Rittenhouse, 2 U.S. (2 Dall.) 160, 162 (1792) ("universal law"); Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116-117 (1784) (assault against a foreign consul is a "crime against the whole world," a "crime against all other nations," and it is "the interest as well as the duty of the government, to animadvert upon . . . conduct [in violation of the law of nations] with becoming severity"); *Ex parte* Dos Santos, 7 F. Cas. 949, 953 (C.C.D. Va. 1835) (No. 4,016) (In his writings, Vattel noted the "duty of the sovereign to prevent, and the consequent duty to punish or surrender."); United States v. La Jeune Eugenie, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551) (with respect to "an offence against the universal law of society," "no nation can rightly permit its subjects to carry it on, or exempt them . . . [and] no nation can privilege itself to commit a crime against the law of nations."); 1 Op. Att'y Gen. 515 (1821) ("crimes against the human family" are prosecutable by "[a]ll nations"); 1 Op. Att'y Gen. 68, 69 (1797) (a "violation of territorial rights . . . [is] an offence against the law of nations . . . [and] it is the interest as well as the duty of every government to punish.").

Universal jurisdiction also exists under the provisions of the vast majority of international criminal law treaties adopted since the mid-1970s. *See, e.g.*, CAT, *supra* note 47, art. 5(2); Terrorist Bombings Convention, *supra* note 35, art. 6(4); Enforced Disappearance Convention, *supra* note 53, art. 9(2); *see also* GC, *supra* note 13, art. 146 ("Each High Contracting Party shall be under an obligation to search for persons alleged to have committed, or to have ordered to be committed . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts . . . [and] shall take measures necessary for the suppression of all acts contrary to the . . . Convention."); Geneva Protocol I, *supra* note 13, arts. 85(1), 86(1); 4 COMMENTARY, *supra* note 13; 3 COMMENTARY, *supra* note 53. Article 6 of the Genocide Convention contains a non-exclusive reference to territorial jurisdiction (where the crime occurs) and that of an international tribunal (which necessarily would include universal jurisdiction) and does not exclude universal jurisdiction. *See* Genocide Convention, *supra* note 50, art. 6; *see also id.* art. 1 (genocide "is a crime under international law," which supports the expectation that there is universal jurisdiction); ICL, *supra* note 6, at 784 n.7, 785 & n.11 (also noting that as a crime under customary international law there is universal jurisdiction in any event). In no international criminal law treaty is there any form of immunity for any person. Concerning nonimmunity under customary international law, see also Paust, *Torture*, *supra* note 44, at 1537-38, 1540-43, 1549-51.

Finally, with respect to definitions and unrealistic generalizations, it is worth emphasizing that any type of person might use the tactic of terrorism in any social context. It is not realistic to aver that terrorism is used only against the innocent, that it is merely random,[55] that it could not be used systematically or on a massive scale,[56] that it cannot be effectuated through use of massive fire power, that it is always of lesser gravity or less serious than a war crime, that it is only "'set deep within national borders,'"[57] that it could not seriously affect the international community in a given instance, or that it always treats the direct victim as an impersonal or symbolic instrumental target as opposed to a personal primary target for terror. Some definitions prefer an element of "violence,"[58] but this can be too limiting in view of the fact that terroristic targetings can occur through use of chemical, bacteriological or biological weapons. For this reason, a definition should include the use or threat of use of violence or a weapon. Some even prefer to use the phrase cyber-terror.[59] Additionally, one should be leery of generalizations about shifts in attention from state actors to nonstate actors in

55. Consider, for example, the specific targetings by al Qaeda of U.S. embassies in Kenya and Tanzania, the U.S.S. Cole, the World Trade Center, and the Pentagon; and the targetings of specific sites more recently in Mumbai, India.
56. *See* ICL, *supra* note 6, at 463 (IMT at Nuremberg noting that the Nazi "policy of terror was certainly carried out on a vast scale"); 717 (Justice Jackson as Chief Prosecutor at Nuremberg stating that Nazis accused were "living symbols of . . . terrorism").
57. *Cf.* Norberg, *supra* note 1, at 13 (claiming that they are "for the most part" deeply internal). The international community has already recognized that impermissible transnational terrorism can occur at the hands or with the aid of the state and, therefore, terrorism is certainly not always deeply within national boundaries. *See, e.g.*, Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 108 (June 27, 1986) (coercive intervention "is particularly obvious in the case of an intervention which uses force . . . in the indirect form of support for . . . terrorist armed activities within another State"); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (Oct. 24, 1970) ("Every State has the duty to refrain from organizing, instigating, assisting or participating in . . . terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts."); African Charter on Human and Peoples' Rights art. 23(2)(b), June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 21 I.L.M. 58 (1983) ("[T]heir territories shall not be used as bases for . . . terrorist activities against the people of any other State Party to the present Charter."); Paust, *The Link Between Human Rights, supra* note 3, at 43-44; *see also supra* note 55.
58. *See, e.g.*, ICL, *supra* note 6, at 1177.
59. *See id.*; *Panel: Cybercrimes and the Domestication of International Criminal Law*, 5 SANTA CLARA J. INT'L L. 432 (2007).

international criminal law when it is realized that a number of international crimes could be committed by private actors prior to World War II—for example, piracy, war crimes, breaches of neutrality, violence by banditti and brigands, conduct of assassins and incendiaries by profession, slave trading, slavery, counterfeiting of foreign currency, misuse of passports, and assaults on foreign officials.[60]

Finally, Professor Norberg's article rightly notes that the U.N. General Assembly and Security Council have reaffirmed that states must comply with human rights law while combating terrorism. She assumes, however, that human rights are given a "back seat" or might be permissibly ignored because of an allegedly created logical primacy based on the order of paragraphs within a few resolutions.[61] This assumes too much, especially since, by analogy, international agreements are read as a whole.[62] More importantly, the General Assembly and Security Council are organs of the United Nations[63] and, as part of the United Nations, they are bound under Article 55(c) of the United Nations Charter to promote "universal respect for, and observance of, human rights."[64] State members are bound to take action to the same effect in all social contexts.[65] Additionally, the

60. *See, e.g.*, ICL, *supra* note 6, at 157, 163, 217-32, 238, 243-44; Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 MICH. J. INT'L L. 1229, 1234-40 (2004); Paust, *The Link Between Human Rights, supra* note 3, at 47-50.

61. *See* Norberg, *supra* note 1, at 35 (a 2006 General Assembly resolution noted in its first paragraph that "States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular, international human rights, refugee and humanitarian law."); Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, G.A. Res. 61/171, ¶ 1 (19 Dec. 2006), U.N. Doc. A/RES/61/171 (Mar. 1, 2007). The 2006 resolution used the same language that appeared in a 2004 resolution with the same title. G.A. Res. 59/191, ¶1, U.N. Doc. A/RES/59/191 (Mar.10, 2005). *See also* Human Rights and Terrorism, G.A. Res. 59/195, pmbl., U.N. Doc. A/RES/59/195 (Mar. 22, 2005) ("Reaffirming that all measures to counter terrorism must be in strict conformity with international law, including human rights standards and obligations."). A resolution in 2008 provided even more detail concerning such obligations. *See* G.A. Res. 63/185, *supra* note 6, pmbl. and ¶¶1, 3, 8, 14, 16; *see also* G.A. Res. 63/129, *supra* note 6, pmbl.

62. *See* Vienna Convention on the Law of Treaties, *supra* note 25, art. 31.

63. U.N. Charter, art. 7(1).

64. *See id.* art. 55(c) (a violation of human rights would violate the duty to observe human rights).

65. *See* U.N. Charter, *supra* note 63, art. 56. This Charter-based obligation applies in all social contexts. Therefore, it applies in time of armed conflict and while fighting terrorists in other

Security Council must "act in accordance with the Purposes and Principles of the United Nations,"[66] which include human rights,[67] and members must carry out decisions of the Council "in accordance with the" United Nations Charter.[68]

The fact that states like the United States have a universal obligation to respect and observe human rights in all social contexts is important when one considers the legality or illegality of certain responses to terrorism, since Charter-based human rights obligations that are universal clearly apply whenever and wherever officials, other employees or agents of the state act or fail to act.[69] Additionally, some proscriptions, such as forced disappearance of persons and torture, cruel, inhuman or degrading treatment, are norms *jus cogens* that override inconsistent international agreements and more ordinary customary international law.[70] Professor Norberg is rightly concerned that definitions of and responses to terrorism must not lead to violations of human rights and norms *jus cogens*. Use of an objective definition of terrorism will help to avoid such a result.

contexts. *Id.* *See also* HENCKAERTS & DOSWALD-BECK, *supra* note 14, at 299-306 (explaining that human rights law applies during war); PAUST, *supra* note 44, at 4, 42, 66-68, 140, 183, 186, 188.

66. *See* U.N. Charter, *supra* note 63, art. 24(2) (a contrary decision would be *ultra vires* per terms of the Charter).
67. *Id.* art. 1(3), 55(c).
68. *Id.* art. 25.
69. *See also* Paust, *Torture*, *supra* note 44, at 1536 n.6, 1553 n.67.
70. *See, e.g.*, *id.* at 1535, 1539 n.21; PAUST, VAN DYKE & MALONE, *supra* note 26, at 61-64.

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